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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2593/2015*, **

Communication submitted by:	M.Z.B.M. (represented by counsel, Gunnar Homann)
Alleged victim:	The author
State party:	Denmark
Date of communication:	31 March 2015 (initial submission)
Document references:	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 1 April 2015 (not issued in document form)
Date of adoption of Views:	20 March 2017
Subject matter:	Deportation of a transgender woman to Malaysia
Procedural issues:	Non-substantiation of claims; inadmissibility *ratione loci* and *ratione materiae*
Substantive issues:	Risk of torture or ill-treatment; arbitrary or unlawful interference with privacy; freedom of thought, conscience and religion; equality before the law; prohibition of discrimination
Articles of the Covenant:	7, read in conjunction with 17 (1), 18 (1) and 26
Articles of the Optional Protocol:	2 and 3

1.1 The author of the communication is M.Z.B.M., a national of Malaysia born in 1977. She claims that her forcible return to Malaysia would violate her rights under article 7, read in conjunction with articles 17 (1), 18 (1) and 26, of the Covenant. She is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 1 April 2015, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested

* Adopted by the Committee at its 119th session (6 March-29 March 2017).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

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the State party to refrain from deporting the author to Malaysia while her case was under consideration by the Committee.

Factual background

2.1 The author was born as a man and grew up in Seramban district, north of Kuala Lumpur. She is ethnically Malay and a registered Muslim, but she considers herself Hindu. At the age of 16, the author left her family and moved to Kuala Lumpur. She also started wearing women's clothing and receiving female hormone treatment. She worked at a restaurant and volunteered for a local non-governmental organization. Her voluntary work consisted of working in the streets to assist those living with HIV and transgender persons. In 1998 or 1999, the author was raped by several unknown individuals.

2.2 In 2007, the author underwent gender reassignment surgery in Thailand.[1] However, she continues to appear as a male on her Malaysian identity card since it is not possible for the gender on the card to be changed. She also appears as a Muslim on her identity card.

2.3 Between 2001 and 2010, on several occasions after being stopped on the street and having her identity card checked, the author was taken into custody by Malaysian police for up to 24 hours and physically and sexually abused.[2] On one occasion, the author went to a police station in Kuala Lumpur to report the rape, but the police refused to register her complaint, after which she did not dare to report any further abuse.

2.4 According to the author, in April 2012,[3] the police in Melaka took her to an office of the Department of Islamic Affairs, where she was detained until the following day. Prior to her release, photographs were taken of the tattoo on her hand, as it is not permitted for a Muslim in Malaysia to have tattoos or to change religion. They also took her women's shoes, since it is forbidden for men to wear women's clothing. Upon her release, representatives of the Department of Islamic Affairs informed her that her case would be sent for adjudication.

2.5 The author arrived in Denmark on 25 January 2014[4] and applied for asylum on 4 February 2014. Following three interviews with the Danish Immigration Service held on 24 February, 3 March and 16 April 2014, respectively, her asylum application was rejected on 28 August 2014. The Danish Immigration Service found the author's account of her detention and sexual abuse by the police in Malaysia to be inconsistent and implausible, in particular in the light of the fact that the author had left Malaysia to travel to India, Singapore and Thailand, and on more than 20 occasions for short periods of time. The Danish Immigration Service also considered it implausible that the author had to wait until January 2014 to leave Malaysia due to lack of funds as she had claimed, taking into consideration her frequent overseas travel, including holidays in India in October 2013. The Danish Immigration Service also noted that the author had not been charged with any criminal offence and that she had not been detained between her last arrest in April 2012[5] and her departure in January 2014.

2.6 On 19 December 2014, the Refugee Appeals Board upheld the decision of the Danish Immigration Service. The Board noted that, despite the threat by the Department of Islamic Affairs that had allegedly been made in April 2012, there had been no follow-up to any potential criminal proceedings against the author, and that until her departure in January 2014, the author had travelled legally in and out of Malaysia on several occasions.

[1] According to her statements to the Danish authorities, the author had lost contact with her family out of fear that they would be ashamed of her, although she became closer to her family after her surgery in 2007.

[2] In her interviews with the Danish Immigration Service, the author stated that she had been stopped in the streets between twenty and thirty times by the Malaysian police for identity checks between about 2001 and 2012.

[3] In her communication to the Committee, the author stated that her detention in an office belonging to the Department of Islamic Affairs had taken place in April 2012. However, in the proceedings before the Danish authorities, she stated that it had taken place on 13 December 2012.

[4] According to her statement to the Danish authorities, the author travelled to Amsterdam on 24 January 2014 and from there to Denmark.

[5] See footnote 3 above.

The Board concluded that the author would not be exposed to a real risk of persecution if returned to Malaysia.

2.7 On 25 February 2015, the author requested the reopening of her case based on the fact that there was a case pending against her before the sharia court in Melaka, where she was being charged with posing as a woman and wearing women's clothing, which could entail a fine or imprisonment of up to six months.[6] The author had obtained a copy of the undated court documents through her family. On 10 March 2015, the Board assessed the new evidence, but rejected the author's request for the reopening of her case, arguing that the there was no new information of significance. According to the Danish Immigration Service's translation of the sharia court documents, the case against the author appeared to be under investigation, pending its transmission to the prosecutor's office. In the heading of the letter sent by the sharia court to the author's sister, there appears the word "closed". The Board noted that it was not certain whether the author would be found guilty as no proceedings had taken place. On 25 March 2015, the author renewed her request for the reopening of her case based on an alleged mistake by the Board in translating a word as "closed" instead of "confidential". On 30 March 2015, the Board rejected the author's request, arguing that the revised translation did not alter the fact that neither the Department of Islamic Affairs nor anyone else had followed up on the charges against the author since April 2012, and that, since that date, the author had been able to travel legally in and out of the country without facing any difficulties until her departure in January 2014, and that she had not faced any further detention or abuse.

The complaint

3.1 The author claims that her forced return to Malaysia would violate article 7 of the Covenant as she would risk being submitted to sexual violence by the Malaysian police. The author alleges that, as a transgender woman, she is part of an extremely vulnerable minority group. The seriousness of the risk that she faces is based on her gender identity and appearance, which are not in accordance with sharia law and for which she was subjected to sexual violence and discrimination by the Malaysian authorities in the past.

3.2 The author also claims a violation of article 7, read in conjunction with article 18 (1), of the Covenant, because her conversion from Islam to Hinduism, which is not permitted by sharia law in Malaysia, puts her at risk of imprisonment upon her return to Malaysia.

3.3 The author also claims a violation of article 7, read in conjunction with articles 17 (1) and 26, of the Covenant because, in the context of the case pending against her before the sharia court, her gender identity and appearance are being made public, thereby violating her right to privacy. Additionally, in the light of her national identity documents, if sentenced to imprisonment, she would be held together with men, thereby exposing her to further abuse.

State party's observations on admissibility and the merits

4.1 In its observations dated 1 October 2015, the State party argues that the communication is inadmissible or, alternatively, without merit. The State party also describes the nature and legal basis of proceedings before the Danish Refugee Appeals Board.[7]

4.2 Regarding the facts of the case, the State party provides an account of the author's statements before the Danish authorities. The author stated that she had not officially converted to Hinduism because it was not permitted by Islam and she would have faced problems with the Islamic authorities. In one of the interviews, she stated that the last time that she had been detained by police officers and forced to perform oral sex had been in December 2012, whereas in a later interview, she stated that she had been last detained and

[6] The author provided the Board with a list of Islamic laws that criminalize gender identity in Malaysia. According to this list, cross-dressing in the State of Melaka may entail a sanction of up to six months' imprisonment.

[7] See, in this regard, communication No. 2379/2014, *Hussein Ahmed v. Denmark*, Views adopted on 7 July 2016, paras. 4.1-4.3.

sexually abused in 2010. Regarding her travels, the author stated that she had travelled to Thailand more than twenty times and to Singapore about fifteen times.

4.3 The State party argues that the author has failed to provide sufficient grounds for believing that her return to Malaysia would violate article 7 of the Covenant.

4.4 With regard to the author's claims under articles 17, 18 and 26 of the Covenant, the State party notes that the author is seeking to apply State obligations under these articles in an extraterritorial manner. Her allegations of violations under these provisions are not based on treatment that the author has suffered in Denmark or a territory under its effective control and therefore the State party cannot be held responsible for these alleged violations.[8] The Committee has never considered a complaint on its merits regarding the removal of a person who feared violation of provisions other than articles 6 and 7 of the Covenant in the receiving State. Therefore, these claims should be declared inadmissible *ratione materiae* and *ratione loci*.

4.5 On the merits, the State party argues that the author's removal to Malaysia would not expose her to a real risk of being subjected to treatment covered by article 7 of the Covenant. To grant a residence permit under section 7 (1) of the Aliens Act of Denmark, the Board requires the existence of a well-founded fear of being subjected to specific, individual persecution of a certain severity if returned to the country of origin, which should be supported by objective facts. When assessing whether this fear is well founded, the Board takes into account, inter alia, the information on persecution available prior to the asylum seeker's departure from their country of origin.

4.6 In her communication to the Committee, the author has failed to provide any new specific information on her situation other than what was already provided and assessed by the Board on 19 December 2014, and 10 March and 30 March 2015. In those decisions, the Board considered the grounds for asylum and the supporting documents and background information provided by the author, including the sharia court documents. The Board conceded that the author had had gender reassignment surgery and that she had been detained for brief periods of time, including in April 2012. However, the Board could not consider it a fact that the author had been sexually abused. Her statements concerning the rapes raised a significant amount of uncertainty concerning the circumstances, number of perpetrators and incidents and the towns or cities where these had occurred. On the whole, the Board did not find it probable that the author had been the victim of this kind of assault. With regard to the alleged threat made by the Department of Islamic Affairs to institute legal proceedings against the author in April 2012, the Board emphasized that no steps had been taken to follow up on that threat since April 2012, and that the author had travelled in and out of the country on numerous occasions since that date and until her departure in January 2014. The Board also noted that most of the incidents referred to by the author had taken place several years earlier and that the author, to a great extent, was able to live a tolerable life in her country of origin, including with her family in Serambam, where her mother was a great support. The Board had concluded that the author had failed to render it probable that she would face a risk of persecution in case of return.

4.7 The State party notes that the Board did not presume that the author would have to conceal her gender or religious identity on her return to avoid abuse. The author had informed local police about her gender and religious identity, despite which she was able to live a normal life without being subjected to abuse. In its assessment, the Board took into account the author's particular vulnerability.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 5 February 2015, the author submitted that she had sufficiently shown that substantial grounds existed for believing that her return to Malaysia would violate article 7 of the Covenant.

[8] The State party cites the jurisprudence of the European Court of Human Rights in the following cases: *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, para. 88; *F. v. the United Kingdom* (dec.), no. 17341/03, decision of 22 June 2004; and *Z. and T. v. the United Kingdom* (dec.), no. 27034/05, ECHR 2006-III.

5.2 With regard to the State party's statement that she is seeking to apply articles 17, 18 and 26 in an extraterritorial manner, the author clarifies that she is arguing that her previous experience combined with available background information on the situation of transgender women in Malaysia confirm that, as a woman, her rights to private life and to freedom of religion would be violated in Malaysia. These factors taken together increase the author's risk of being subjected to cruel, inhuman or degrading treatment or punishment if returned.

5.3 The author notes that having undergone gender reassignment surgery and taken female hormones — together with the fact that she is 170 cm tall, weighs 105 kg and has a shoe size of 44 — she appears as an unusually large woman and that this external appearance gives rise to suspicion of whether she is a man dressed in women's clothing. It is most likely for this reason that the author has been subjected to frequent identity checks by the Malaysian police and that she would be again at risk of those checks. Also, in the context of those checks, the tattoos on her chest, left hand and her back would also be uncovered. Based on that, she would be transferred to the sharia court for the case that is pending against her.

5.4 The author cites several reports by governmental and non-governmental organizations on the situation of transgender people in Malaysia. In particular, a report by Human Rights Watch[9] notes that discrimination against transgender people is pervasive and that the Federal Court decided in October 2016 to overrule a lower court decision that had declared unconstitutional a provision in the Islamic law of the Negeri Sembilan State criminalizing cross-dressing. According to a report by the Department of State of the United States of America,[10] transgender individuals are often charged under the Minor Offences Act for "indecent behaviour" and may be fined or, in the case of repeat convictions, sentenced to up to three months' imprisonment.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee takes note of the author's claim that her return to Malaysia puts her at risk of imprisonment due to her alleged conversion to Hinduism, i.e. violation of article 7, read in conjunction with article 18 (1), of the Covenant, as conversion is not permitted by sharia law in Malaysia. The Committee notes, however, the State party's submission that the author informed the Danish authorities that she had not formally converted to Hinduism. Furthermore, in this connection, the author has not provided the Committee with any details regarding her alleged conversion, or the consequences thereof. She has not claimed that the alleged case against her before the sharia court in Melaka is related to her joining Hinduism, or that she has otherwise been subjected to persecution as a result of her conversion, nor has she provided any details regarding the likely risk and nature of such persecution if she were returned. Accordingly, the Committee concludes that this claim is insufficiently substantiated and therefore inadmissible pursuant to article 2 of the Optional Protocol.

[9] Human Rights Watch, *World Report 2016* (New York, 2016), pp. 393-394.

[10] United States, Department of State, "Country reports on human rights practices for 2014 — Malaysia", 25 June 2015.

6.5 The Committee notes the State party's argument that the author is seeking to apply articles 17 and 26 of the Covenant in an extraterritorial manner. It notes, however, that the author has clarified that her claims before the Committee are based primarily on article 7 and that the risk to her rights under articles 17 and 26 underscore the increased risk that she would be subjected to cruel, inhuman or degrading treatment or punishment if she were returned to Malaysia. The Committee therefore considers that the author's allegations under articles 17 and 26 cannot be dissociated from the allegations under article 7, which must be determined on the merits.

6.6 The Committee notes the State party's argument that the author's claims under article 7 of the Covenant are insufficiently substantiated. The Committee notes, however, that as a transgender individual the author is part of a particularly vulnerable group in Malaysia, that she claims to have been repeatedly detained and subjected to sexual abuse as a result of her appearance and gender identity, which do not correspond with her identity document and are contrary to sharia law, and that she has argued that her return to Malaysia would expose her to a risk of further police harassment and abuse. The Committee therefore considers that the author has sufficiently substantiated, for the purposes of admissibility, her claims under article 7, read in conjunction with articles 17 (1) and 26, of the Covenant, based on her gender identity.

6.7 In the light of the above, the Committee declares the communication admissible insofar as it appears to raise issues under article 7, read in conjunction with articles 17 (1) and 26, of the Covenant, and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee takes note of the author's claim that, if returned to Malaysia, she would face the risk of being submitted to sexual violence by the Malaysian police based on her gender identity. The author states that her appearance, given her dressing in women's clothes and following her gender reassignment surgery and hormonal treatment, does not correspond with her identity documents, for which she has been detained on several occasions, submitted to sexual abuse by the Malaysian police and charged with a criminal offence under the sharia law of the State of Melaka, which could entail a fine or imprisonment of up to six months. She alleges that her appearance makes it likely that she will be subjected to continued checks if she is returned to Malaysia given her past experience and the general context of criminalization and persecution of transgender women, as confirmed by international reports submitted by the author, and that her tattoos increase the risk that she will be transferred to the sharia court. She states that, in the context of the case pending against her before the sharia court in Melaka, her gender identity is being made public, in violation of her right to privacy. She further states that, based on her national identity documents, if imprisoned, she would be held together with men, thereby exposing her to further abuse.

7.3 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to their obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, which prohibits cruel, inhuman or degrading treatment or punishment. The Committee has also indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.[11] The Committee further recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such a risk exists,[12]

[11] See, inter alia, communications No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2; No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6; and No. 1833/2008, *X v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

[12] See communication No. 1957/2010, *Z.H. v. Australia*, Views adopted on 21 March 2013, para. 9.3.

unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[13]

7.4 In the present case, the Committee notes that the State party has acknowledged the author's change of gender and the fact that she may have been detained in the past. However, both the Danish Immigration Service and the Refugee Appeals Board thoroughly examined the author's claims and evidence presented, but found the allegations of detention and, in particular, sexual abuse to be poorly substantiated and inconsistent on several grounds, including the number, time and location of the alleged incidents and the number of perpetrators. In this regard, the Committee notes that the author described those incidents in a generic manner in her communication. Regarding the alleged criminal proceedings against the author under sharia law and the threats of imprisonment made in 2012 as a result, the Board also reviewed the sharia court documents presented by the author but noted that the charges against her had not been pursued since April 2012 and that, between that date and her final departure in January 2014, the author had frequently travelled abroad without ever experiencing any difficulties, and that she had not been detained or otherwise harassed during that time. In the light of these trips abroad, the Board also questioned the author's claim that the reason for delaying her departure until January 2014 was her lack of financial means.

7.5 The Committee notes that the author has failed to identify any irregularity in the decision-making process or any risk factor that the State party's authorities failed to take properly into account. While the author has challenged the factual conclusion reached by the Danish immigration authorities, she has not explained how the proceedings before these authorities were arbitrary or otherwise amounted to a denial of justice.

7.6 In the light of the foregoing, the Committee cannot conclude that the removal of the author to Malaysia would constitute a violation of her rights under article 7, read in conjunction with articles 17 (1) and 26, of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the author's removal to Malaysia would not violate her rights under article 7, read in conjunction with articles 17 (1) and 26, of the Covenant.

[13] Ibid.